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FM AMCONSUL HONG KONG  
TO SECSTATE WASHDC IMMEDIATE 9030  
INFO AMEMBASSY BEIJING IMMEDIATE  
NSC WASHDC IMMEDIATE

C O N F I D E N T I A L HONG KONG 001444

DEPARTMENT FOR EAP AND EAP/CM

E.O. 12958: DECL: 03/17/2030  
TAGS: PREL PGOV HK CH  
SUBJECT: ACTING CE TSANG PLAYING DEFENSE

REF: A. STATE 47822  
1B. HONG KONG 1351 AND PREVIOUS

Classified By: JAMES KEITH, CONSUL GENERAL. REASONS: 1.4 (b, d).

¶1. (C) Summary and comment/suggestion: On March 17, I met Hong Kong Acting Chief Executive (CE) Donald Tsang to convey U.S. concern about the rule of law in Hong Kong (ref a). Tsang insisted that the Hong Kong Government (HKG) had reached its position on the two/five year question through common law methods, after a reasoned study of documentation relating to the drafting of the Basic Law. He understood that Beijing would be releasing some or all of those documents, which the HKG would disclose. Tsang believed that the decision in favor of a two-year tenure for the next CE was accepted by most of the community, and argued that had the decision been for five years, there would probably have been public demonstrations in opposition, since it would have postponed the further democratization expected in the 2007 CE election. I emphasized that our concern was not about the politics or popularity of the Government's decision, but whether it was solidly grounded in the law.

¶2. (C) Comment/Suggestion: Tsang did not depart from the approach that has driven the HKG since its March 12 press conference. He asserted that the HKG's decision was consistent with the Basic Law and with the HKG's strong commitment to the rule of law in Hong Kong. He and his Secretary of Justice are steadfastly ignoring legal opinion in Hong Kong as they defend that position, including the Hong Kong Bar Association and internationally recognized legal scholars at Hong Kong's universities and law schools. In so doing, they are depending on popular opinion, which is influenced by former and unpopular CE Tung's departure and an incipient honeymoon period for the Acting CE. We have done the HKG a favor by registering firmly our concern about the rule of law that arises from this situation. Tsang and the central authorities need to cogitate on the long-term damage that could be done to Hong Kong's reputation for transparency and respect for the rule of law. This is not about opinion polls or the lack of street demonstrations; it is more important than that. I believe it is necessary for us to be on record with a more focused statement on the dangers to the rule of law in Hong Kong, and I recommend that the message come from the podium in Washington to ensure it is not dismissed as ad hoc commentary from the field. End summary and comment.

¶3. (C) On March 17, I delivered on instruction the demarche contained ref a to Acting CE Donald Tsang, adding that we did not intend to make either the contents of the demarche or the fact of the meeting public. I observed that we raised these questions in a spirit of friendship and support, and with a desire to let the HKG know how its actions were being perceived in the international community. I explained that our concerns were not focused on the substance of the choice of two versus five years for the tenure of C.H. Tung's successor. Rather, the U.S. Government was entirely focused on legality of the process and its implications for the continued integrity of rule of law in Hong Kong under "one country two systems." In response to his question, I assured Tsang that Washington had already received all the documents explicating the Secretary of Justice's reasoning for adopting

a new point of view on this question (ref b).

¶4. (C) Acting CE Tsang responded that the public response thus far indicated to him that the majority of the community was convinced that it was better for C.H. Tung's successor to serve for two years. This included members of the U.S. and international business community. Tsang explained that Secretary for Justice Leung had made several trips to Beijing to research the issue, reading various documents and records from the drafting of the Basic Law. Through her study of the documents indicating the drafters' legislative intent, she became convinced that the drafters had not intended for Article 53, which provides for replacing a Chief Executive, to be directly linked to Article 46, which specifies that the CE's term of office is five years, but rather to Annex I, and thus to the tenure in office of the Election Committee. The Executive Council, as well as Tsang himself, had been convinced by her reasoning and had accepted the decision. The key factor, according to Tsang's self-professed "unprofessional but logical" analysis, was that, since the CE was not returned by universal suffrage but rather by the Election Committee, the term of a CE could not extend beyond the mandate of the Election Committee that selected him or her. In response to my question, Tsang said that he understood that the Beijing authorities would be making public the records on legislative intent and other matters that had been provided to Leung. The HKG intended to disclose this additional information as soon as possible. I encouraged Tsang to do so soonest, citing the lack of transparency to date as an important impediment to acceptance of the HKG's interpretation among legal scholars in Hong Kong.

¶5. (C) Tsang said that the HKG had reached its decision by following common law procedure, not by simply accepting a central government diktat. Constitutions were always subject to interpretation, including differences of opinion as to how they should be interpreted, he pointed out. In this case, where the constitutional issue was related to the authority of the sovereign, the central government in Beijing, it was even more difficult. Legal debate would undoubtedly continue. Furthermore, there were bound to be more such controversies in the future. Tsang thought it was fortunate that in this instance Hong Kong had been able to come to agreement with the central government; that might not be the case in the future.

¶6. (C) As to the actual tenure of the next CE, Tsang thought that if the decision had been for a five-year term of office, there would have been tremendous public opposition. It would have brought people out onto the streets, outraged because the extremely important 2007 CE election would have been forestalled. Even though there would not be universal suffrage in 2007, there would be a greater degree of democratization. Politically, a two-year term was much more acceptable.

¶7. (C) I reiterated that, on the substantive question of two years versus five, we had no views. That was a matter for the Hong Kong people and their governments here and in Beijing. Our concern was that the process be fully grounded in the rule of law, and that there had been a lack of transparency in the decision-making process. One could understand the need for prudence in considering amendments to or interpretations of the Basic Law, but in so narrow and technical a case as this one an interpretation from the National People's Congress (NPC) Standing Committee might have provided the necessary legal foundation, a foundation that appeared to be missing at present.

¶8. (C) Sighing visibly, and thereby letting slip a tinge of frustration associated with the unenviable position he had to defend, Tsang agreed that in hindsight the HKG should and could have done more to prepare for this situation. No one expected that Article 53 would be used. Nevertheless, once again missing (perhaps deliberately) the key point I tried repeatedly to register, Tsang reiterated his belief that the public was satisfied with both the outcome and the process.

Of course, the opposition was not satisfied, but that was a different matter. For the Hong Kong people, preserving the rule of law and human rights were the most important issues, and the HKG would continue to act with this in mind. Ending the meeting, he asked the Consul General to convey his thanks to Secretary Rice for her concern for the future of Hong Kong. I undertook to do so.

KEITH